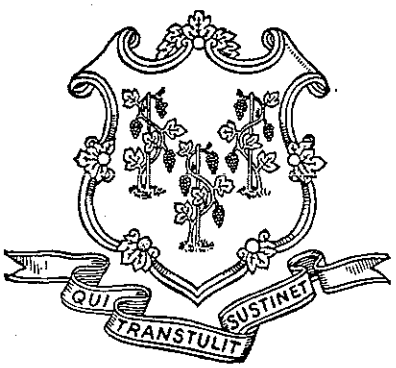
# SECOND INJURY FUND

Connecticut

General Assembly




LEGISLATIVE
PROGRAM REVIEW
AND
INVESTIGATIONS
COMMITTEE

# CONNECTICUT GENERAL ASSEMBLY
# LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE

The Legislative Program Review and Investigations Committee is a joint, bipartisan, statutory committee of the Connecticut General Assembly. It was established in 1972 to evaluate the efficiency, effectiveness, and statutory compliance of selected state agencies and programs, recommending remedies where needed. In 1975, the General Assembly expanded the committee's function to include investigations, and during the 1977 session added responsibility for "sunset" (automatic program termination) performance reviews. The committee was given authority to raise and report bills in 1985.

The program review committee is composed of 12 members. The president pro tempore of the senate, the senate minority leader, the speaker of the house, and the house minority leader each appoint three members.

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## EXECUTIVE SUMMARY

The Second Injury Fund (SIF), created in the 1940's and reconfigured during the late 1960's has significantly evolved in effect and cost, if not purpose, over almost a half century of existence. It was initially intended to minimize an employer's financial risk in hiring a previously injured employee, should that person be injured on the job again. For example, an employee who lost an eye or limb to a previous on-the-job accident is hired again and loses the other eye or limb in a subsequent accident. That employee's physical loss is substantially greater because of the compounding effects of the two accidents than it would have been with only the second accident. That purpose of the fund has not changed, but the use and financial impact in Connecticut and elsewhere has.

Operating much like a high risk pool, the fund allows carriers or employers to shift loss payouts for second injury workers from their reserves to the fund. As workers' compensation losses spiraled in Connecticut during the last decade, some carriers and self-insured employers moved aggressively to transfer all cases that would qualify to the fund. The result was an extraordinary growth in fund outlays, particularly during the last five years.

In FY 1988-89 the fund disbursed $39.8 million. For FY 93/94 fund planners budgeted $133 million, though year-end outlays will probably be less due to strategies to defer some expenditures. In 1988 carriers and self-insured employers requested transfer of almost 4,000 new cases to an existing pool of 19,579 claimants within the fund. In 1993 the pool of claimants (active, pending and closed) numbered 52,570. The fund expended $2 million for administration in FY 88/89. This fiscal year $6 million has been budgeted. Currently there are about 4,000 active cases being paid by the fund with more than 20,000 pending -- seeking transfer into the SIF.

Few organizations could experience this magnitude of growth in such a compacted time frame and not have their administrative gears begin to grind and overheat. Connecticut's Second Injury Fund operation was no exception, and received a chorus of complaints from the insurance carriers and self-insured employers over delays in transferring cases and processing reimbursement payments. At the same time, the carriers and employers also complained of the fund's rising administrative costs. To some measurable degree, the delays and rising costs are a product of the flood of transfer requests pouring in from the insurers and employers.

The fund responded with an organizational overhaul beginning in late 1993. That same year legislation was passed (P.A. 93-429) and signed into law that narrows the window in which insurers and employers can apply to transfer their cases. Prior to the change in law, carriers could notify the fund for transfer of a case as soon as the injury occurred, even though in most cases the transfer would not be eligible until two years after the injury. The net effect of the new law is to slow the growth rate of transfer requests in the short run. However, it has no impact on the number of cases that will eventually enter the fund. Within 12 to 24 months, the

growth of applications should resume its upward spiral, since it is in the economic self interest of carriers and self-insured employers to transfer every eligible case to the fund.

While the magnitude and growth of Connecticut's Second Injury Fund ranks among the top three of all other states, its problems are not unique -- just larger. Most states with active second injury funds experienced significant growth over the last decade. A number responded by restricting their funds through tighter entry requirements and/or coverage benefits, or eliminated their SIF's altogether.

In 1992 Kansas conducted an sweeping overhaul of its fund and set June 30 of this year as the last date of liability for cases that can be transferred into the fund. It is a shut down of the fund (for liability purposes) as of July 1, 1994. The state will continue to reimburse carriers and employers for all cases that are in or become eligible up to June 30th. Other states have closed down their funds: Colorado and Maine in 1991; Minnesota in 1992; and Massachusetts is in a phaseout. Michigan, Oklahoma, and Pennsylvania, have tightened entry restrictions.

For Connecticut there are no simple or painless solutions. The second injury fund, given current state and federal law, is a costly program whose time and purpose are probably in the past. It is an unfunded insurance plan with runaway costs, few controls, no prospect for a downward turn in the cost curve, and an estimated financial exposure to the current and future employers of Connecticut that likely reaches into the billions.

The options for solving the dilemma range from tinkering to termination, depending on the level of short term pain the players can endure or long term pain they defer to. Organizational and administrative restructuring, whether within the fund or through privatization, does not address the central issue -- the runaway costs. The big outlays are driven by the workers' compensation structure, which has undergone significant reform in the last few years. The fund only provides a redistribution of the burden from the aggressive to the less aggressive users of it. Debate on problem solutions has resided within the organizational sphere -- reorganize Second Injury Fund operations; privatize all fund operations; privatize some of the fund operations, such as claims management -- all of which beg the issue -- the spiraling aggregate costs.

This report discusses in some detail systemic problems such as programmatic disincentives to reduce growth, control issues, financial and equity distortions among payers and players, client load, and costs. The committee findings are made without the benefit of an actuarial report estimating the total unfunded liability of the Second Injury Fund at this point in time. That study, conducted by the actuarial and consulting firm of Milliman & Robertson, Inc., of Wakefield, Mass., was underway at the time the committee completed its study, and about three months from completion.

The Committee, however, received time series cost and client data generated by the fund, which when coupled with known average cost data, provided reasonable estimates of short term fund obligations, and gross projections of liabilities over the long term. The committee did not

have the benefit, though, of detailed case analysis that would offer a precise estimate of current and future liabilities. Thus, the program review committee issued its report without recommendations, and agreed to have its chairpersons participate in a special task force to define future of the Second Injury Fund.

# INTRODUCTION

Public Act 93-228, passed during the 1993 session of the General Assembly, initiated significant reforms in the state's Workers Compensation system. To a much lesser degree, the act addressed a few issues within the Second Injury Fund (SIF), an agency that functions much like a high risk pool fund, assuming the risk among employers of workers with disabilities or who sustained injuries during previous employment.

Among the actions taken by P.A. 93-228 concerning the Second Injury Fund was a requirement that the Legislative Program Review and Investigations Committee, along with the Labor and Public Employees Committee, study the fund. The study mandate was made amidst growing concerns within the legislature, the executive branch, and private industry over the accelerating growth in numbers of clients and attendant cost impacting the fund over the last five years. Benefit and administrative costs will likely exceed $115 million this fiscal year, up from less than $40 million just five years ago.

Section 31 (a) of the act specified four areas of study, stating the study shall include, "(1) a determination of the impact that dissolution of the fund would have on businesses located in this state, (2) a determination of the unfunded liability, (3) a determination of the impact of the federal Americans with Disabilities Act on the fund, and (4) an analysis of the factors and conditions associated with the explosive growth of the workers' compensation system and its impact on the second injury fund."

On October 15, the program review committee met and adopted a resolution to conduct a study that would address items (3) and (4), and item (1) to a limited degree, of the P.A. 93-228 mandate. Item (2), a determination of the unfunded liability of the SIF caseload, is a study in and of itself requiring significant actuarial expertise not available to program review staff. Moreover, the State Treasurer, under whose aegis the fund operates, agreed to solicit, select, and hire a qualified actuarial consultant to conduct that aspect of the study.

The impact of the fund's dissolution depends to some degree on the state's (and insurers') exposure to the unfunded tail of cases already within the SIF system, and those potentially eligible for transfer into it up to the point at which the fund would be terminated. Therefore, program review will evaluate this item from a policy and conceptual perspective, but not so to the degree it could discuss detailed financial implications. That discussion would need the data provided by the actuarial study.

Chapter I of the report describes the purpose, history, and administrative process of the Second Injury Fund; discusses operational and fiscal data; and presents similar, but not necessarily comparable, data from other states. Chapter I concludes with a discussion of the purpose and impact of the American Disabilities Act.

Chapter II outlines committee analyses of the fund in the context of: operational, financial, and activity data over time; other state operations; comparisions with other states; and projections for the future.

This chapter also presents the committee's findings, but does not offer recommendations. The committee deferred recommendations to a task force that was convened to explore and make policy recommendations on the future of the Second Injury Fund. The committee's decision to defer recommendations also hinged on the lack of firm actuarial data that was being gathered by a consultant at the time the committee completed its study. Moreover, the committee cochairpersons were named to the task force defining the future of the fund.

# CHAPTER I

# FUND DESCRIPTION

## Purpose

The Second Injury Fund, and similar activities in other states, were originally intended to facilitate the hiring of a worker who previously suffered a serious injury on another job.

The funds were created to mitigate reluctance on the part of an employer to hire a previously injured worker, who, if injured again, might expose the employer to a greater liability through workers' compensation because of the combined effect of the two injuries. For example, if a worker who lost the sight of one eye in a previous injury were to lose the sight of the other eye in a second injury, the net effect of the second injury is substantially greater to the individual (and the employer's attendant worker's compensation liability) than if there had been no first injury. A similar example would be the loss of limbs -- one hand in the first injury and the other in the second.

The second injury funds were intended to make the hiring of previously injured individuals less risky to employers, and thus avoid discrimination against the individual because of the injury. To the degree the fund covers the ultimate cost of the added effect of the second injury, the employer is held harmless, and has no reason to discriminate against the employee for his or her handicap.

Moreover, the fund provides a mechanism for employers who hire previously injured employees to spread the risk among all employers, thus minimizing their individual exposure. Contributions to support the administrative and benefit costs of the second injury funds come from all employers, not the general funds of state budgets. Throughout most states, employers are assessed to support fund costs either directly or indirectly through their workers compensation insurance carriers. States use a variety of assessment techniques, which will be discussed further below.

## Fund Evolution

The second injury funds in all states, and Connecticut in particular, have evolved over the years. Since 1968 Connecticut has gradually expanded the breadth of the fund, and broadened the focus of its intent. Indeed, it can be argued the intent of the fund is now concerned with preventing or mitigating discrimination against the hiring of an individual with a handicap, regardless of how acquired, and not just a prior injury occurring on the job.

A generation of amendments have been added to Connecticut's workers' compensation act in general, and the section addressing the SIF in particular, that have impacted the operation and cost of the fund.

Since 1968 11 sections or subsections of the workers' compensation law have been amended or added that directly increase benefit payouts from the fund. Further, direct enhancements to workers' compensation benefits, unrelated to SIF expansion, have served to escalate benefit costs to the fund.

Generally, the fund assumes responsibility for benefit payments to an individual eligible for transfer into the Second Injury Fund after he or she has been receiving disability payments under workers' compensation for 104 weeks. This occurs in a case where the prior injury or condition was unknown to the employer. However, if the employee had informed the employer prior to the second injury that he or she had a preexisting condition, and did so in writing, the case could be eligible for immediate transfer to the fund, and shortcut the two-year waiting period.

Once the case is transferred to the fund, the employer, or the employer's insurer, is relieved of all financial and case management responsibility for the claim. Once accepted, the case than becomes full financial and management responsibility of the Second Injury Fund.

The 11 sections added or amended over the last few decades that financially impact fund are discussed briefly below.

Premium Reimbursement. An employer, by law, must maintain health insurance coverage for an employee on workers' compensation for a temporary disability or eligible for it. If the individual's case is eligible for transfer to the fund, SIF picks up these costs.

Payments During Appeal. If a self-insured employer or insurance carrier is ordered by the Workers' Compensation Commission to pay wage and medical benefits in a case and appeals that decision, the fund will pay the benefits until the appeal is heard and adjudicated. An employer or carrier who loses the appeal must reimburse the fund for the cost of benefits paid out plus interest.

Survivor COLAS. Dependents of employees killed on the job on or before Sept. 30, 1977, and whose deaths were compensable, receive cost-of-living adjustments (COLA's) to benefits paid them. Employers or carriers may be reimbursed by the fund for the COLAs they pay.

Total Disability COLA. If a worker, injured before Oct. 1, 1969, is receiving total disability benefits, he or she will receive annual COLA's for which the carrier or employer is reimbursed by SIF.

Relapse/Recurrence. If a worker returning to work after a total disability injury received before Oct. 1, 1969, suffers a relapse, he or she may receive a higher wage benefit and be eligible for COLA's. These costs are reimbursable by the fund.

Pre-1953 COLA. This benefit adjustment is similar to the total disability COLA above, only the closing date for eligibility is Oct. 1, 1953. The fund pays this benefit adjustment directly to the claimant.

Expiration of Partial. For persons with a permanent partial disability in which the wage benefit has run out, Sec. 31-308a of the law gives the Workers' Compensation Commissioner discretion to allow payment to continue. The carrier or employer may be reimbursed by the fund for the additional costs.

Other Employment. A person working two or more jobs, and injured at one of them, may be compensated for lost wages of all jobs held at the time of the injury. Wages and medical benefits are covered under workers' compensation for the job at which the injury occurred, and wages for the other job(s) are covered under the Second Injury Fund.

Acknowledgment of Defect. If a person tells a new employer in writing that he or she has a physical handicap, disease, or injury, and that defect could place the individual at greater risk on the new job, then a subsequent injury on the job, can be covered by the SIF prior to the 104-week waiting period. The acknowledgement can only be used if the handicap poses a greater or unique risk to the employer. The issue here is written notification of the prior condition or handicap to the employer. Moreover, the prior condition does not have to cause or be proximate to the second injury.

Second Injury. This is the heart of the SIF program and engine of the fund's rising costs and growing client list. This is the second injury that results in a disability which is significantly greater than the two injuries independently or in sum. Two examples were described above. The fund is liable for all lost wage and medical benefits after the two-year period of payments by the employer or carrier. The prior condition does not have to be work related. It could result from most any cause, including birth defects.

Employer Relocation or Closing. If a firm relocates or closes, persons receiving benefits under workers' compensation will continue to have health insurance paid for by the fund. This fund responsibility ties in with that part of the law requiring companies to maintain health insurance for employees receiving compensation benefits.

Uninsured Employer. Under this provision, the Second Injury Fund covers compensation costs for that individual injured while employed by a firm without workers' compensation insurance or a self-insured employer who fails to pay compensable claims.

Each of these activities contributes, to a greater or lesser degree, to the overall cost, complexity, and administrative requirements for managing the fund. Except for the "true second

injury" the other elements described above individually and collectively account for a small proportion of the dollars disbursed and the number of clients served. However, given the staggering growth of the fund during the last half decade, even an incremental advance caused by an obscure section of the law adds to the increasing imbalance of the system.

## SIF SYSTEM PROCESS

Transfer of cases into the Second Injury Fund is a complex, time-consuming, and generally adversarial process involving: the insurance industry; employers throughout Connecticut; and the Offices are the State Treasurer, Attorney General, and the Workers' Compensation Commission.

The State Treasurer's Office has fiduciary and administrative responsibility for operation of the fund. The Attorney General's Office is responsible for representing the interests of the state in ensuring only eligible cases are transferred to the fund. And the Workers' Compensation Commission adjudicates and approves transfer of all cases into the Second Injury Fund.

As discussed above, a case meeting the statutory criteria is transferred into the fund, relieving the insurance carrier or self-insured employer of further financial and administrative responsibility for the particular case. The law is complex and at times ambiguous, and the stakes are high -- SIF will disburse more than $100 million during FY 93-94. Thus, it is no mystery that many insurance carriers and some self-insured employers have aggressively sought to transfer as many of their workers' compensation cases as possible to the fund.

Indeed, the behavior among more aggressive carriers and employers has been to file acknowledgements for transfer to the fund on any and all cases that might even remotely qualify. In FY 92-93, 11,830 notices of intent to transfer cases were filed with the Workers' Compensation Commission, up 19 per cent from the 9,945 filed the year before. Of course, not all of these cases will ultimately be transferred to the fund. Some will be resolved by the worker returning to work, negotiated settlements, and other means prior to the transfer deadline. Other cases will be found ineligible.

Prior to adoption of P.A. 93-429, insurers and employers have steadily been moving forward the date at which they would formally file to transfer cases. The old law specified that this notification must occur at least 90 days before the 104-week eligibility deadline was reached. However, because of a backlog in processing and adjudicating transfer cases, transfer notices were being filed as soon after the second injury that the employer or insurer determined the case was potentially eligible. This in turn, forced the opening and maintaining of files by the fund that might ultimately never be heard, and which contributed to the agency's administrative demands, and exacerbated an already backlogged case problem.

Last session, the legislature passed P.A. 93-429 which prohibited insurers and employers from filing the notice more than one year before the 104-week deadline.

## Second Injury Fund Revenue and Disbursements

Assessments. Revenue for benefit and operating cost disbursements to clients within the fund is generated directly and indirectly from employers through periodic assessments by the State Treasurer's office. Employers who carry workers' compensation insurance pay their share of the assessments through their individual insurance carriers. Self-insured employers are assessed directly. The assessment is based on the total amount of the previous year's paid losses for workers' compensation, and may range up to 5 per cent of this amount for a given assessment. The law sets a ceiling on the individual assessment percentage but no limit on the number of assessments the treasurer may issue in the course of a year to keep the fund solvent.

Insurance carriers pass the SIF assessment directly on to employers insured through them in the form of a surcharge on their workers' compensation premiums. The assessments, based on workers' compensation loss costs, are computed by the National Council on Compensation Insurance (NCCI) into a percentage of aggregate premium for each insurance company. The insurer then adds this percentage surcharge to every employer's workers' compensation premium. Self-insured companies are directly assessed based again on workers' compensation system aggregate loss costs and converted to an imputed premium surcharge ratio.

In both cases, however, the employer's financial obligation to the fund is determined by the previous year workers' compensation system aggregate loss cost. The premium surcharge is not based on the number of workers' compensation cases that have been transferred from the individual company to the Second Injury Fund. This method spreads the Second Injury Fund financial exposure to all employers within the state.

However, a company or insurer who aggressively transfers cases may shift a disproportionate share of its cost burden to those insurers or companies that do not. For example, if insurance company "A" transfers every eligible case to the fund, and company "B" transfers only half of its eligible cases (for whatever reason), company "B" will in effect be paying for a portion of company "A's" workers compensation liability through the Second Injury Fund.

In FY 92-93 the State Treasurer issued three assessments at the full 5 per cent ceiling, which resulted in billings to carriers and employers of $96.2 million. This represents a 5 per cent increase over the three FY 91-92 assessments, which generated $91.3 million in billings. In FY 90-91 the treasurer issued only two assessments for $49.4 million. Thus, in two years the assessments have almost doubled. It is anticipated the treasurer will issue four assessments during the current fiscal year or defer some of the current year costs to FY 94-95

Disbursements. Disbursements from the fund occur generally in four ways: 1) indemnity (lost wage) payments directly to workers' compensation clients transferred to the fund; 2) payments to medical providers for services to these clients; 3) stipulated settlements (lump sum

payments) to clients which are intended to conclude the obligation to a worker; and, 4) retroactive payments reimbursing carriers and employers for medical and indemnity benefit payments made to a client during the period between the point when the case was eligible for transfer into the fund and when it actually was shifted to fund responsibility -- years in some cases. In FY 93, the Second Injury Fund disbursed $90 million for benefits and reimbursements alone. Disbursement data in the aggregate, over time, and among states will be discussed further below.

## Transfer Process

Transfer of a case into the fund is a complicated, and often times lengthy procedure, involving all three state agencies noted above. It begins within 12 months of when an insurer or self-insured employer considers a case to be eligible. Prior to passage of P.A. 93-429, initiation of the process could begin almost two years before the eligibility date, as discussed above. The process starts with a letter of notification to the fund offices, the Attorney General, or the Workers Compensation Commission, that the carrier or company seeks transfer of a particular case to the fund. With receipt of the notice, the fund opens a file, inserting all evidence and documentation supporting the contention that the file should be transferred.

Independent of the Attorney General, the fund acting on behalf of the State Treasurer could agree to a stipulated settlement with a lump sum payment and closure of the case, or it could also agree to transfer the case. It is rare either happens initially. As custodian of the Second Injury Fund, the ultimate responsibility for transfer of a case into the fund rests with the State Treasurer. Though no aggregate data are available because of the manual file and management information systems, it is believed most significant cases are contested, at least initially.

There are no hard data on the number of cases that are settled quickly by stipulated agreement. However, it is likely that most "true second injury" cases are complex and involve serious injuries. These are the cases falling under section 31-349 of the statute that have driven the spiraling growth of the fund over the last five years. These cases are more likely to follow a protracted adjudicatory path to resolution than be settled by stipulated agreement. During FY 93 stipulated agreements accounted for only $13.6 million, or 15 per cent of the total claim disbursements for the year. However, the actual amount of these lump sum agreements increased $4.8 million, 54 per cent, over the previous year.

| Table I. Categorical Disbursement* | | | | | | |
|---|---|---|---|---|---|---|
| CATEGORIES | FY 92-93 | | FY 91-92 | | FY 90-91 | |
| Med. Costs & Reimbursements | $41,758 | 52% | $27,436 | 26% | $27,105 | |
| Lost Wages | $34,664 | 21% | $28,714 | 17% | $24,485 | 17% |
| Stipulations | $13,603 | 54% | $8,805 | 8% | $8,206 | N/A |
| SIF Admin.* | $5,000 | 6% | $4,700 | 31% | $3,600 | 20% |
| TOTAL | $95,025 | 36% | $69,655 | 20% | $57,996 | 16% |

* $(000)

Source: Second Injury Fund

Small cases can be stipulated early in the process by the Attorney General, who has been given authority by the treasurer to settle cases up to $50,000 in cost. The fund can also settle cases by early stipulation independent of the attorney general's office, but generally does not and the cases track through the attorney general's office.

A lump sum settlement, equitable to the state and claimant, can be a desirable avenue for moving cases through the system and foregoing a long-term obligation for the fund. However, it should only be used when eligibility for fund transfer is clear and there is mutual benefit to both sides in agreeing upon the settlement amount.

Determination of eligibility is not a simple decision on which all parties would easily come to agreement. Indeed, the law is complex, and acceptance into the fund is governed by dates, circumstances, type, extent, and conditions of both the second injury and previous one or condition. Extensive documentation, pounds or reams of it, dealing with each argument or element of the law, may comprise a single case file.

Aside from the notification, storage, and update of the file, no action is taken by fund offices until the case has been adjudicated by the Attorney General's office. The adjudication process may be a simple agreement between the attorney general and the insurer that the case is indeed eligible, and the case is transferred to the SIF. Usually, however, a case is not so easily disposed. The most difficult scenario could involve years of adjudication before the Workers' Compensation Commission and litigating an appeal through the court system. Cases

between the extremes involve numerous informal and formal hearings before a compensation commissioner, meetings and depositions between attorneys general and insurer or employer, and finally an agreement before or decision by a compensation commissioner.

At the end of September 1993, the fund had a count of 51,609 files, two thirds of which were either pending or active. Active files are those which have been transferred into the fund. Pending files are those in the entry process. To place the backlog in perspective, the fund in September was managing 3,813 active files with 25,092 pending. Certainly not all of the pending cases will enter the system. Some will be stipulated out (though still enter the system), others will be resolved on their own, and many may be ineligible.

It is only after the adjudicatory process has run its course, however long or short, that the Second Injury Fund assumes an active function in the case. To this point, the fund's role has been a limited one of file custodian. After this point, the fund disburses checks to SIF clients, medical providers, and carriers or self-insured employers due reimbursement payments.

It is this limited SIF responsibility and the attorney general's primary responsibility during the adjudicatory phase that have created tension among all of the principal players in this process. Insurers and employers have complained the process is slow and cumbersome. The compensation commissioners, along with attorneys for the insurers and employers, have complained that too often meetings, hearings, or depositions are scrapped or unproductive because the assistant attorney general representing the state is unprepared for lack of the case file. Without the case file, the attorney representing the state cannot argue or discuss the case. And at the root of the missing case file problem is the location of the file cabinet -- 15 miles away from the attorney general's office.

The Second Injury Fund offices are located in Windsor, the attorney general's office is on Elm Street in Hartford, and the Workers' Compensation Commission offices are spread in eight district offices around Connecticut. A special unit within the attorney general's offices adjudicates all transfer claims.

To carry out an activity concerning a case, the assistant attorney general or an office paralegal assigned to the case, must on a written form, reasonably in advance, request the file for the particular case from the fund offices in Windsor. At least 10 days to 2 weeks before the activity, the file must be pulled and transported via courier from the fund's Windsor office to the attorney general's office in Hartford. Following the activity, the file is then sent back to the fund offices via courier for maintenance and storage until it is needed for the next hearing or meeting.

The activities for which specific files are needed by assistant attorneys general are informal hearings, formal hearings, depositions, meetings, trials, and appeals. Most of these are formal and informal hearings before a compensation commissioner. On any given day 25 to 50 of these activities may be occurring. This is 125 to 250 per week, for each of which a file folder must be pulled, transported from Windsor to Hartford, and then returned following

the meeting for refiling. Moreover, there is no automated requisitioning or tracking system for file transfer to which both offices are linked. Each has a marginal automated system, but they are incompatible and cannot link up.

Symptomatic of the problem is the response program review received to a request from both offices for an accounting of the number of files requested from the fund by assistant attorneys general and the number received or sent. The request covered January through September 1993.

For the full nine-month period, both offices are reasonably close in their assessments of the percentage of files requested but not received by the attorney general's office -- A.G.- 14.5 per cent, SIF - 13.7 per cent. There, however, the similarity ends. The attorney general's office said **1,037 files were requested** in September of which **198 were received.** The fund offices, on the other hand, said in September the attorney general's office **requested 7,545 files, of which 855 were transferred** to it by the fund. However, the fund explained a substantial portion of the discrepancy was due to duplicate requests by the AG, files still at the AG's office, or files simply not in the system, bringing the net **AG requests for September to 896. The actual number of files transferred were 855**, according to fund records. The seven-fold discrepancy between the number of files the attorney general's said it requested and the requests the Fund offices said it received is unexplained.

Moreover, the **Fund offices claim assistant attorneys general had requested 48,601 files be transferred** to them between Jan. 1, 1993 and Sept. 30, 1993, while **the attorney general's office said it only requested 5,798 files during the same nine months.** Similarly, the **fund said it shipped 7,010 files** to the attorney general's office, while the **latter claims to have received only 4,959.**

There are a variety of reasons to explain the disparate numbers between the two offices, not the least of which are manual and antiquated electronic file management systems, 14 miles between file cabinet and user, and system demands undergoing rapid growth. More importantly, each office has different objectives, responsibilities and constituencies, and it is not clear that a marriage of the two functions and agencies at this point in the process is needed, or even appropriate. Certainly electronic and geographic tinkering might mitigate some of the paper movement problems, but this begs the larger question of what the appropriate policy and organizational configurations ought to be.

The unit within the attorney general's office responsible for fund legal activities consists of a 38-person staff: a director; 14 attorneys; 12 paralegal assistants; and 12 clerical workers. Aside from a rudimentary file management system, the AG/SIF unit is without a coherent, centralized, sophisticated data processing system to manage, plan, control or monitor its activities. Indeed, the entire Attorney General's Office is largely without a modern automated system.

Most business is generally carried out on paper. The device for planning and scheduling the 500 to 700 hearings, informal hearings, depositions, meetings, trials, and appeals a month is a handwritten, loose leaf journal. Furthermore, the journal is the only centralized historical record of activities carried out in the past (and those to be carried out in the future) by AG/SIF unit attorneys and paralegals. There is no other single source for determining staff workload or activity within the unit historically. It is the only source for planning future activities. All centralized scheduling, workload, and assignments are managed and monitored with the same 8 1/2 X 11 ring binder.

**Proposed Administrative Remedies**

Currently underway or planned are a number of strategies intended to resolve the administrative problems. The Second Injury Fund at this writing is creating a satellite file management office within the Attorney General's Office. It will not be a central file repository, rather a file transfer unit. Both offices are moving toward more sophisticated, compatible data processing and electronic file management systems. And the fund is in the midst of an organizational restructuring effort, including redesign of systems, procedures and processes.

**Claims Administration Process**

Once a decision is rendered by a compensation commissioner, notwithstanding appeals or a stipulated lump sum payment agreed upon,it leaves the interest of the attorney general and becomes the full administrative responsibility of the Second Injury Fund. For its part during this phase, the fund should function in much the same way as an insurance company (excluding product development, marketing, sales, etc.). Its function is to adjust, manage, and pay claims to those workers' compensation clients whose cases have been transferred from insurance carriers and self-insured employers to the fund.

The Second Injury Fund administrative office has 63 budgeted full time positions under the direction of an assistant treasurer. As of September 25, 1993, 53 of the 64 positions were filled. The fund also recently contracted with two physicians to conduct medical case analysis for medical case management purposes. These contract physicians replace a nurse consultant who conducted medical case reviews until early 1993. For much of the year the fund operated without medical case management services.

The claims processing function is the center of fund responsibilities. Last year the fund processed more than $90 million in claims, a financial outlay that has grown 138 per cent from $37.8 million four years ago. The most dramatic growth occurred during the last fiscal year, when payouts rose almost 39 per cent, as Table IV shows.

## COSTS OVER TIME

**Table II CONNECTICUT DISBURSEMENT DATA**
**FISCAL YEARS 1989 - 1993 (000)**

| Description of Program | Statute Citation | Payout 1988/89 | Per Cent Total | Payout 1989/90 | Payout 1990/91 | Payout 1992/93 | Per Cent Total | % Change FY 89-93 |
|---|---|---|---|---|---|---|---|---|
| Premium Reimburse | 284 b | $268 | 0.7% | $430 | $780 | $988 | 1.0% | 268.7% |
| Pymts During Appeal | 301 b | $775 | 2.0% | $967 | $920 | $1,205 | 1.3% | 55.5% |
| Survivor COLAS | 306 b | $3,089 | 8.2% | $3,010 | $3,990 | $4,877 | 5.0% | 57.9% |
| Total Disablty COLA | 307 a | $1,416 | 3.7% | $1,088 | $1,325 | $1,314 | 1.4% | -7.2% |
| Relapse/Recurrence | 307 b | $0 | 0.0% | $47 | $118 | $66 | 1.0% | 0.0% |
| Pre-1953 COLA | 307 c | $105 | 0.3% | $84 | $74 | $16 | 0.0% | -84.8% |
| Expire of Partial | 308 a | $1,068 | 2.8% | $1,326 | $1,889 | $3,375 | 3.6% | 216.0% |
| Other Employment | 310 | $1,050 | 2.8% | $1,123 | $1,466 | $2,982 | 3.1% | 184.0% |
| Acknowledge Defect | 325 | $428 | 1.1% | $943 | $597 | $2,050 | 2.2% | 379.0% |
| Second Injury | 349 | $27,549 | 72.8% | $35,591 | $40,647 | $68,795 | 72.0% | 149.7% |
| Employer Move/Close | 349 f | $3 | 0.0% | $140 | $505 | $1,528 | 1.6% | 50820.0% |
| Uninsured Employer | 355 | $2,101 | 5.6% | $2,098 | $2,086 | $2,831 | 3.0% | 34.8% |
| Disbursements Total | | $37,852 | 100.0% | $46,847 | $54,396 | $90,025 | 100.0% | 137.8% |
| Administration | | $2,000 | 5.0% | $3,000 | $3,600 | $5,000 | 5.3% | 150.0% |
| TOTAL | | $39,852 | | $49,847 | $57,996 | $95,025 | | 138.4% |

It is clear from the table above that "true second injury" claims -- sec. 31-349 -- drive growth and the bottom line. Over the four years shown, Second Injury Fund disbursements rose from $27.5 million to $68.8 million, up 150 per cent. Each year this particular outlay accounted for almost three quarters of total disbursements. Further, almost all sections experienced triple digit percentage growth during the period, though each in and of itself accounts for a small proportion of the total.

Other states, which will be discussed in greater detail below, do not offer the sweep of benefits to second injury claimants Connecticut does, particularly in the area of medical payments. It is difficult to compute precisely the proportion of disbursements that are exclusively medical, largely because the medical component cannot be extracted from SIF reimbursement data.

Reimbursements are those payments made to insurers and employers to cover their client payment costs for the period between start of eligibility and the actual transfer of the case to SIF. Those reimbursements cover not only medical benefits, but also insurer/employer payments for lost wages and stipulated settlements. A review of SIF FY 93 disbursement data, less reimbursements, showed medical payments accounted for 14 per cent of the total disbursements. However, this ratio does not include the medical outlays masked in the reimbursement payments, which program review staff estimate to be an additional 11 to 16 per cent. Conservatively, one could argue that medical payments account for about 25 to 30 per cent of the total disbursements.

Most of the states reviewed for comparative purposes during the course of this study do not provide medical benefits through their second injury funds.

## CHAPTER II

## OTHER STATES

Not all states operate a second injury fund or subsequent injury fund. There are about 38 states managing funds somewhat comparable in intent and function to Connecticut. From there, however, the comparability digresses significantly. The program review committee surveyed the 38 states on their activity levels for the last five years. The survey gathered data on disbursements, client load, medical case management units, administrative costs, and significant system changes. Due to varying degrees of automation and information management sophistication, the data for some variables are not complete, and others are estimates. The data for any given state may represent a fiscal year or a calendar year. However, in each case the most recent year (FY 92-93 or CY 92) represents the last official full year of data for the state. Additional state data were assembled from the National Council on Compensation Insurance (NCCI).

### Statutory Intent

Almost all states reviewed, in their enabling legislation, refer to the second injury as compounding the effects of an "impairment" or "disability". Only a few states refer specifically to the "first injury" effects that make the second injury far more serious than it would have been in isolation, as discussed above. Clearly the intent of most states is to cover the individual with a disability or handicap, however acquired -- on the job, off the job, by disease, or congenitally. In this context, "second injury" is a misnomer, since there is not necessarily a referent "first injury." The purpose stated by the Kansas second injury fund succinctly sets down what most states intend -- "to pay for a second injury sustained by a **handicapped** employee."(emphasis added)

### Structure and Revenue

Organizationally, about half (18) of the 38 states reviewed located their second injury funds within their workers' compensation or industrial commissions. Another third were units within their respective state departments of labor. The rest were divided among departments of revenue, insurance or commerce, a treasurer's office, or were free standing.

Obviously, states vary in the complexity of their individual Second Injury Fund operations, depending on the size and scope of their programs. For a number of states with small programs, such as Idaho, Indiana, Iowa, or Mississippi, the entire operation might be managed part time by one individual. Other states with large fund operations have scores of employees providing the full range of services, including direct payment, claims adjustment, medical case management, and managed care systems. Administrative costs may be borne entirely by the particular fund, or they may be covered separately through the state's general fund.

All but three raise their revenue through some form of assessment, often based on compensable deaths, no-dependency death cases, or a ratio of workers' compensation loss costs. The other three use a workers compensation premium tax. Assessment billings of insurance carriers and

self-insured employers may be processed by individual fund offices, state tax offices, treasurers or other collection mechanisms. Assessments among the large SIF payout states, like Connecticut, have had significant growth over the last five years as greater demands were placed on their funds. In an action unique to the trends in big fund states, Missouri recently suspended its 3 per cent premium assessment for 1994 because fund growth had leveled off and there are sufficient reserves for CY 94.

Governance of the funds is equally variable among the states, depending to a large degree of the individual agency's organizational location. States with free-standing second injury funds have indepen-dent boards setting policy, such as Georgia's Subsequent Injury Trust Fund, which is overseen by a five-member board of directors appointed by the Governor.

A number of states have significantly changed their funds during the last few years, including five states that eliminated them: Colorado and Maine in 1991; Minnesota in 1992; Kansas in 1994; and Massachusetts is in a phaseout. Three other states -- Michigan, Oklahoma, and Pennsylvania -- have tightened entry restrictions for their funds. And Indiana, Iowa, and New York have increased benefits. Many states have never expanded their programs, nor made them very accessible. Vermont is notable in this respect, never having placed a client in its fund.

## Activity Data

Each state has generally adopted the same purpose for its fund, but each implements that intent in different ways. Indeed, every fund is unique to its own economic, industrial, labor, and political climates, defying simple comparisons. Table III below could be viewed as a description of each state's commitment to its second injury fund in terms expenditures. That is, it is a state's commitment if the disbursements reflect a conscious policy decision and not unplanned growth resulting from unanticipated changes in economic activity.

Table III contains data gathered through a program review committee staff survey, briefly described above, conducted of 38 states with second injury funds that are similar to Connecticut. Not all states were able to provide all of the data sought in the survey. Table III includes 33 states providing both claims and disbursement data. The table shows a full range of activity, including the largest states in SIF payout and client load. The data are arrayed in descending order by amount of disbursements (column 3) for the last full fiscal or calendar year. The five states omitted for lack of data are: Alabama, Hawaii, New Mexico, Massachusetts and Virginia. Massachusetts, as noted above, is currently phasing out its fund.

## TABLE III. NATIONAL DATA BY STATE

| State CY/FY 1993 | Claims Current | Second Inj. Fund Disbursements | Claim Ratios | Labforce Ratios | SIF/COMP Per Cent |
|---|---|---|---|---|---|
| Kentucky | 14,832 | $112,200,000 | $7,565 | $64.33 | 33.7% |
| New York | 28,060 | $108,815,300 | $3,878 | $12.77 | 11.2% |
| Connecticut | 3,813 | $90,024,800 | $23,609 | $53.06 | 19.2% |
| Florida | 4,470 | $76,923,000 | $17,209 | $11.74 | 6.9% |
| South Carolina | 1,904 | $46,747,300 | $24,552 | $26.38 | 20.4% |
| Michigan | 4,151 | $40,863,000 | $9,844 | $8.86 | 5.9% |
| Georgia | 2,956 | $33,638,000 | $11,380 | $10.41 | 5.2% |
| Minnesota | 4,853 | $32,467,000 | $6,690 | $13.36 | 7.1% |
| Oklahoma | 2,716 | $18,113,191 | $6,669 | $11.86 | 8.0% |
| Missouri | 13,987 | $16,871,030 | $1,206 | $6.26 | 3.7% |
| Louisiana | 1,500 | $16,342,900 | $10,895 | $8.45 | 4.0% |
| Maryland | 818 | $10,078,300 | $12,321 | $3.84 | 3.2% |
| Colorado | 879 | $7,944,900 | $9,039 | $4.52 | 2.7% |
| California | 2,117 | $6,072,200 | $2,868 | $0.40 | 0.1% |
| Wisconsin | 170 | $5,000,000 | $29,412 | $1.88 | 1.0% |
| Delaware | 400 | $4,330,200 | $10,826 | $11.64 | 6.8% |
| Tennessee | 500 | $2,700,000 | $5,400 | $1.11 | 0.6% |
| Alaska | 98 | $2,100,000 | $21,429 | $8.02 | 2.0% |
| Arkansas | 100 | $1,887,800 | $18,878 | $1.64 | 1.0% |
| South Dakota | 100 | $1,484,600 | $14,846 | $4.11 | 2.5% |
| Illinois | 138 | $1,008,702 | $7,309 | $0.16 | 0.1% |
| New Hampshire | 46 | $858,300 | $18,659 | $1.36 | 0.5% |
| Idaho | 173 | $770,000 | $4,451 | $1.49 | 1.2% |
| Iowa | 56 | $620,000 | $11,071 | $0.40 | 0.3% |
| Texas | 38 | $480,899 | $12,655 | $0.05 | 0.0% |
| Nebraska | 43 | $476,900 | $11,091 | $0.56 | 0.4% |
| Montana | 1,621 | $437,300 | $270 | $1.06 | 1.4% |
| Pennsylvania | 28 | $191,200 | $6,829 | $0.03 | 0.0% |
| Indiana | 100 | $100,000 | $1,000 | $0.04 | 0.0% |
| Maine | 5 | $66,300 | $13,260 | $0.10 | 0.0% |
| North Carolina | 10 | $27,800 | $2,780 | $0.01 | 0.0% |
| Mississippi | 6 | $6,200 | $1,033 | $0.01 | 0.0% |
| Vermont | 0 | $0 | ERR | $0.00 | 0.00 |

In addition to ordering the states by amount of disbursement, Table III creates three ratios for evaluating the activity levels among different funds. They are: Claim/Disbursement Ratios (column 4 -- Claim ratios); Labor Force/Disbursement Ratios (column 5 -- Labforce Ratios); and Second Injury Fund Disbursement/Workers Compensation Disbursement Ratios (column 6 -- SIF/COMP Ratios).

Claim ratios are a simple average of dollars paid per claim, and relate the disbursement costs to the number of individuals in a given SIF system. Comparatively, these ratios might suggest a couple of factors about each state -- the ease with which a case might be transferred into the system (low value), the generosity of the workers compensation system (high value), and inclusion of medical payments in the SIF (high value). The first factor may not reflect eligibility criteria whatsoever with a particular state, rather it could measure the efficiency with which cases are transferred into the fund.

As Table III shows, Kentucky, New York, and Connecticut rank at the top of the disbursement list, but not so with the average cost per claim statistic. Here Connecticut is second among the top three, but the other leaders are Wisconsin and South Carolina. Among leaders in disbursements, Kentucky is unique in that it is driven by the coal mining industry and most of the disbursements are associated with black lung disease.

New York's high disbursement outlay appears to be a function of the ease with which cases are transferred into the fund. Except for Kentucky, no other state begins to approach it in the number of current claims, particularly among large industrial states.

The range of disbursements varies from Kentucky's high at $112 million to Mississippi and Vermont at the lower end. Vermont disbursed no funds FY 93 and Mississippi paid out only $6,235. Connecticut ranks near the top in all Table III statistics: Claims - 7th; Disbursements - 3rd; Claim Ratios - 2nd; Labor Force Ratios - 2nd; SIF/Workers Compensation Ratios - 3rd.

The fund serves as a device to reduce workers' compensation payout costs. The ratio of second injury fund to workers' compensation disbursements (column 6 - SIF/COMP) no doubt reflects a combination of the cost of benefits and the mix of cases transferred to the fund. That is, the fund is the repository for the some of the most severe and costliest cases, which pushes up fund disbursements and reduces workers' compensation outlays.

Further, this statistic could be interpreted as some measure of the vigor with which insurers and self-insured employers have used the fund as a safety valve for growing workers' compensation costs, by shifting cases to it where ever possible.

The SIF/COMP ratio in Connecticut is equal to about one fifth of the entire workers' compensation payout for FY 93, and exceeded by only two other states -- Kentucky and South Carolina. No other state approaches the top three with this ratio. New York is the next closest at 11 per cent, and the balance of states are in single digit ratios.

The ratio of disbursements to labor force (Column 5 -- Labforce ratios) could be viewed as another comparative measure of SIF utilization. This statistic represents the average number of SIF dollars disbursed per member of the labor force. Again, Connecticut ranks near the top in second place and double

that of South Carolina in third place. Essentially, this statistic says $53.06 were spent in FY 93 by the Second Injury Fund for every person in the labor force -- six times what Michigan spent, and four times that of New York, Minnesota, and Florida.

The labor force measure is neutral to any behavioral response, such as the SIF/COMP statistic. That is to say, there should be no change in SIF utilization as a result of an increase in the labor force in the same way and for the same reason an increase in workers' compensation payouts might push up SIF disbursements because of aggressive transfer efforts by insurers. For this reason, it may be a better comparative measure among states than the SIF/COMP ratio.

What is clear from the data is that Connecticut and Kentucky use the second injury fund significantly more than other states. These are two states vastly different in most respects. Of importance to Connecticut is the difference in growth rates of the two funds. Over the last five years, Kentucky's fund has grown from $67.4 million to $112.2 million, up $44.8 million, or 66 per cent. Connecticut's fund, on the other hand, has grown $52 million, or 137 per cent. And this, with more than 25,000 pending cases seeking entry into the fund.

## THE AMERICANS WITH DISABILITIES ACT

In its mandate, P.A. 93-228 requires that the program review committee determine the impact of the federal Americans with Disabilities Act (ADA) on the Second Injury Fund. There is an assumed intersection of the purposes of both. That is, SIF and ADA intend to remove work place barriers to an individual with a handicap. Indeed the goals of the fund and ADA intersect, but their methods diverge. As discussed above, the Second Injury Fund attempts to achieve the goal by mitigating the financial exposure of the employer. The ADA, on the other hand, simply makes it against the law for an employer to discriminate against a disabled individual. ADA is far more global in who and how it protects within the handicapped community.

### Background

The ADA was signed into law July 26, 1990, setting down broad areas of protection under four titles -- employment, public services, public accommodations and service of private organizations, and telecommunications.

A disability is defined within the act as, "A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such impairment; or C) being regarded as having such an impairment."

Beginning July 1994 "Employer" is defined as an organization with 15 or more employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Until July, the minimum sized organization is 25 employees. The U.S. Government, indian tribes and Internal Revenue Code 501(c) private membership clubs are also excluded from the "employer" definition.

For a qualified, disabled individual, the law prohibits discrimination under all conditions and procedures of employment including job application, hiring, promotion, discharge, compensation, and training because of the disability. The operative word here is "qualified." If an individual is qualified to perform a job, he or she cannot be denied equal treatment or be discriminated against in any of these areas.

Moreover, the act requires that "reasonable accommodations" be made in the work place by the employer to facilitate employment of an individual defined as having a disability. Appendix A of the report is a detailed description of the employment provisions contained in Title I of the ADA. It was prepared by Judith Lohman, principal analyst in the Office of Legislative Research.

Clearly, there is a convergence of intent in the Second Injury Fund and the Americans with Disabilities Act. If the argument turned solely on the policy goals of each, it would seem ADA obviates the need for a Second Injury Fund. However, the argument is much broader than a narrow policy interpretation, and includes operational questions such as the effective implementation of ADA.

# CHAPTER IV

# PROGRAM DISCUSSION

## Programmatic Disincentives

There are few incentives to control growth in the scale and cost of the Second Injury Fund. The individual client is largely unaffected by whether his or her medical costs and lost wages (indemnity) are paid by workers' compensation insurance or the Second Injury Fund. As long as the worker is eligible to receive workers' compensation benefits, he or she receives it regardless of Second Injury Fund status.

The employer who receives workers' compensation coverage through an insurance carrier feels no direct benefit from the transfer of an injured employee to the fund by his or her insurance carrier. The employers' workers' compensation premiums are generally computed on their individual loss cost ratios, and a variety of other elements unique to their industry. The employer, however, does pay a surcharge on the workers' compensation premium to support SIF operations.

As discussed in Chapter I, this surcharge is based on the aggregate of workers' compensation loss cost ratios, and translated to a single percentage which is applied to the individual employ-er's workers' compensation premium. For example, if every one of a particular employer's workers' compensation cases could be transferred in to the SIF, it would not materially affect the employer's workers' compensation premium or the SIF surcharge. More will be discussed on this effect below. There are short and long term benefits accruing to the insured employer who keeps his workers' compensation claims low and thus reduces fund costs. However, for most employers the connection between the surcharge their worker's compensation experience is neither apparent nor particularly meaningful.

It is to the direct short run benefit of insurers and self insured employers to transfer as many of their workers' compensation clients as possible to the Second Injury Fund. The present and future cost of each case transferred is a direct reduction in their workers' compensation payout. The cost is then shifted via surcharge to the insured employers with few workers compensation cases.

The shift is probably most beneficial to the insurance carrier, since, for the most part, the surcharge is passed directly through to the employer. At the same time, the insurer has transferred those cases' liabilities against its reserves to the second injury fund. To some degree, the insurer, in transferring a case, has collected premiums for a risk and loss that occurred, but has not had to fully pay out for that loss. The insurer's loss reimbursement is not a full recovery, since most second injury cases are not eligible for transfer until 104 weeks have passed from the date of injury. Further, there is an adjustment made in premium rate setting to reflect the transfer of a portion of workers' compensation cases into the fund.

However, the SIF adjustment is prospective (covering the next rate period, usually a year) and based on data three years old. For example, worker's compensation insurance premiums established in 1993 for 1994 payments are modified for SIF transfers made in 1990. If the number of transfers to the fund was constant year to year, the actuarial adjustment to workers' compensation premiums for SIF transfers would most likely be accurate. During a period of significant annual growth, such as 1985 through the present,

the premium reduction to allow for SIF transfers would not reflect the greater numbers of transfers occurring due to aggressive activity on the part of the insurer.

For example, historical data in 1988-90 (upon which the 1994 premiums are set) might indicate 500 cases will be transferred from workers' compensation rolls to the second injury fund in 1993, and the premium cost is adjusted for this amount in 1993 for 1994 premiums. However, in 1994 the insurers collectively succeed in transferring 1,000 cases. This is a 500 case reduction in the insurers' collective reserve burden for which they collected premiums but are not obligated to pay all of the losses. Those costs are shifted back to employers at a future date through assessments for Second Injury Fund disbursements. This hypothetical example, is a simplification of a very complex process that plays out over a number of years. Moreover, other factors come into play that somewhat mitigate the benefits accruing through this process to insurance carriers and self-insured employers.

For insurance carriers and self-insured employers there are no formal nor economic incentives for them to aggressively manage cases which are eligible and will transfer into the Second Injury Fund. This is not to say insurers or employers do not manage potential SIF cases as well as they would manage those they do not transfer. No data are available to test the thesis, but the fact is the economic incentives are not there. If a carrier or employer has a long term case that is clearly eligible for transfer after 104 weeks, there is no economic motivation to aggressively manage the case to get the individual back on the job in two, three, or four years. The financial obligation for the case to the insurer or employer will end after two years. Certainly there are humanitarian and larger social reasons motivating the company to do its best for the injured individual, but there are few economic reasons.

The insurance carrier or self-insured employer responsible for a worker's compensation case for its full term will vigorously manage that case to insure medical procedures and bills are appropriate, rehabilitative therapy applied, and recovery monitored to return the individual to productive health as soon as possible. It is in the carrier's or employer's economic self interest to move the recovery period along as efficiently, economically, effectively, and quickly as possible. Carriers have argued this incentive is lacking with a disinterested third party, such as government. Even with a well trained and experienced case management staff, the motivation is not as keen as when driven by a profit and loss statement.

## System Controls

There are no market or economic controls to rein in growth of the fund. Even if the point were reached where all insurers and self-insurers equally exploited use of the fund at whatever level of cost, there would be no market force to drive down utilization. Indeed, any carrier or employer choosing to not use the fund would do so at his or her own economic disadvantage. To not use it shifts the financial burden to the non-user since the cost is the same to all.

Without a policy change, the only control the state can effect is to slow down the administrative process. This does not reduce the ultimate liability, it only delays payment of it. The fund cannot unilaterally change entry or transfer restrictions, nor can it refuse to accept an eligible client. Moreover, it is obligated to accept and process as many transfers and claims as efficiently and effectively as possible. Since insurers and employers benefit from their transfers, it is in their interest for the fund to have adequate

administrative resources to process transfers and claims quickly. It is expected that if the reimbursement checks and client transfers to the fund proceeded quickly and efficiently, the carriers and self insured would attempt to exercise few controls over growth.

The net effect is there are few controls over the system, and nothing exists within that will alter its pace, momentum, or direction. Change can only occur from without by altering the policies from which it grows.

## System Distortions

The second injury fund is a system that is economically friendly to its users. At this point in time it pays to play, and in the future when participation becomes pervasive, it will be costly not to play.

Employers not using the fund, as self insurers or through their carriers, subsidize those that do. To a degree, employers with good workers' compensation records subsidize those with poor records, since the SIF assessment premium multiplier is constant for all employers. Self-insured employers shift their worker's compensation costs to insured employers and those self-insured with less aggressive transfer strategies. And the same can be argued for workers compensation insurance carriers. To the degree an insurance company successfully transfers burdens on its worker's compensation reserves to the Second Injury Fund in relation to its competitors, it enjoys an economic advantage.

The distortions created by the fund are probably most keen with new business in the state. Unlike all forms of insurance where the premium pays for future protection from risk, fund assessments pay for prior losses. This twist is most counter productive to economic development, when a preeminent issue has been the cost of workers' compensation insurance. Workers' compensation premium rates are expected to level or decline because of system reform. Then may not, however, because of rising SIF assessments.

Businesses entering the state, new industries developing within it, and existing businesses expanding, face a rapidly growing additional worker's compensation cost that is neither based upon their risk level nor experience. For FY 92/93, every $100 of loss paid out by the workers' compensation system, another $20 was paid out through the Second Injury Fund.

On the other side of the ledger, businesses that leave Connecticut or close do not share in paying for the burden they helped create. And with more than 20,000 pending cases currently within the SIF system, it is a burden with a long half life.

## PROGRAM GROWTH

### Growth in Cases

Client load and average cost per case comprise the expenditure engine for a second injury fund. Chapter I discussed expenditure patterns in other states. Some states had low numbers of clients and high average payout rates. Others had large client loads and low payout. States with high benefit levels and large numbers of clients led the ranking among states. Kentucky is notable in this regard, with the most expensive second injury fund of those surveyed. New York and Connecticut, however, ranked second and third respectively.

The best exhibit of Connecticut's Second Injury Fund growth and its potential for future growth is depicted by Table IV. These are data drawn from an automated case tracking system operated by the fund. From these data the committee developed a last-year profile showing the number of transfer requests made by insurers or self insurers by year, running total and percentage growth, total claims received, pending claims, and closed claims.

**Table IV. 10-Year Growth of Fund**

| YEAR FUND NOTIFIED OF TRANSFER AND FILE OPENED | | | | |
|---|---|---|---|---|
| YEAR FILE OPENED | RUNNING TOTAL & (%) GROWTH | TOTAL CLAIMS RECEIVED | PENDING AND MSCL. CLAIMS | CLOSED CLAIMS |
| 1984 | 13,091 (3%) | 426 | 48 | 257 |
| 1985 | 14,134 (8%) | 1,043 | 130 | 661 |
| 1986 | 16,334 (16%) | 2,200 | 331 | 1,470 |
| 1987 | 19,579 (20%) | 3,245 | 588 | 2,127 |
| 1988 | 23,524 (20%) | 3,945 | 941 | 2,390 |
| 1989 | 28,337 (17%) | 4,813 | 1,610 | 2,545 |
| 1990 | 34,229 (21%) | 5,892 | 2,576 | 2,553 |
| 1991 | 41,026 (20%) | 6,797 | 4,160 | 1,902 |
| 1992 | 47,652 (16%) | 6,626 | 5,737 | 533 |
| 1993 | 52,570 (10%) | 4,918 | 4,667 | 85 |
| TOTALS | (300%) | 39,479 | 20,788 | 14,573 |

Source: Second Injury Fund - (unaudited data)

Since 1984, as shown in the table, almost 40,000 claims have been filed for transfer to the fund. This decade accounts for almost 80 per cent of all transfer requests filed during the life of the program -- almost 50 years. Moreover, 60 percent of the last decade's growth occurred after 1990. Since 1986, when the growth spurt began, the number of cases within the system racheted up at a rate of about 20 per cent per year to July of 1993.

Table IV reflects calendar year data, and masks the fiscal year growth for FY 92/93 (July 1, 1992 - June 30, 1993). File transfer requests grew by 19 per cent for FY 92/93, but only by 10 per cent for calendar year 1993. The decline results from implementation of P.A. 93-429, which reduced the notification filing window to a nine-month period beginning 12 months after the injury. The net effect of the law was to remove 12 months from the filing window for carriers and employers. Thus, the 10 per cent growth for 1993 is an artificial decline that will likely resume its climb in late 1994 and early 1995 when the startup effect of the law begins to run out. The law change provided a brief paperwork respite, but did not affect the rate of injuries and claims.

Of equal importance are data in the "pending" column, since they represent the future. Almost 21,000 requests for transfer are pending in a system that will cost more than $100 million this year serving only about 4,000 cases. Not all 21,000 cases will enter the system. Some will return to work, others leave the state, some settled with a lump sum payment, and some currently in the system will leave it and their cases closed.

The fund, incidentally, in February 1994 froze all lump sum settlements for the last four months of the 1993-94 fiscal year, pending development of a settlement policy. Originally, the fund budgeted $21 million for stipulated (lump sum) settlements during FY 93/94. However, More than $13 million was disbursed by lump sum as of Feb. 17, and the Treasurer froze these disbursements at $15 million (to include stipulated settlements in the pipeline).

The critical fact is there currently exists a substantial backlog of cases seeking entry into the fund, and more applying each month. The second column in Table IV indicates the potential for continued growth. From 1986 the fund has grown near the rate of 20 per cent per year, or numerically, from 1043 in 1985 rising to almost 6,800 new cases per year (1991) over most of the decade. On the other hand, case closures have been relatively constant at about 2,000 per year. The 20,788 pending cases represent net new cases, over and above the closures. Thus, the future burden is currently represented by approximately 25,000 active or pending cases.

## Table V. Claims Within Second Injury Fund

**CLAIMS ARRAYED BY YEAR OF INJURY**

| YEAR OF INJURY | TOTAL CLAIMS* | ACTIVE CLAIMS (%) | PENDING & MISCL. (%) | CLOSED CASES (%) |
|---|---|---|---|---|
| 1969 | 341 | 10 (3%) | 50 (15%) | 280 (82%) |
| 1970 | 236 | 3 (1%) | 38 (16%) | 194 (82%) |
| 1971 | 243 | 12 (5%) | 33 (14%) | 197 (81%) |
| 1972 | 267 | 18 (7%) | 46 (17%) | 216 (81%) |
| 1973 | 304 | 21 (7%) | 45 (15%) | 236 (78%) |
| 1974 | 348 | 21 (6%) | 50 (14%) | 276 (79%) |
| 1975 | 345 | 23 (7%) | 39 (11%) | 282 (82%) |
| 1976 | 376 | 20 (5%) | 50 (13%) | 302 (80%) |
| 1977 | 435 | 42 (10%) | 64 (15%) | 321 (74%) |
| 1978 | 462 | 39 (8%) | 66 (14%) | 352 (76%) |
| 1979 | 734 | 87 (12%) | 90 (12%) | 549 (75%) |
| 1980 | 911 | 106 (12%) | 107 (12%) | 684 (75%) |
| 1981 | 1003 | 141 (14%) | 97 (10%) | 740 (74%) |
| 1982 | 1390 | 144 (10%) | 206 (15%) | 983 (71%) |
| 1983 | 1726 | 213 (12%) | 254 (15%) | 1218 (71%) |
| 1984 | 2404 | 260 (11%) | 461 (19%) | 1609 (70%) |
| 1985 | 3016 | 320 (11%) | 677 (22%) | 1935 (64%) |
| 1986 | 3359 | 345 (10%) | 971 (29%) | 1979 (59%) |
| 1987 | 4377 | 480 (11%) | 1498 (34%) | 2324 (53%) |
| 1988 | 4847 | 553 (11%) | 2102 (43%) | 2130 (44%) |
| 1989 | 5351 | 529 (10%) | 2938 (55%) | 1858 (38%) |
| 1990 | 5429 | 364 (7%) | 3825 (70%) | 1231 (23%) |
| 1991 | 4817 | 124 (3%) | 4209 (87%) | 483 (10%) |
| 1992 | 3488 | 24 (<1%) | 3403 (98%) | 60 (2%) |
| 1993 | 882 | 2 (--) | 876 (99%) | 4 (--) |

*Inactive cases not included in table
Source: Second Injury Fund - unaudited data

Table V above narrows in a little closer on future costs. This table depicts the number of claims grouped by year of injury, that is, when the claimant received the injury which potentially makes him or her eligible for transfer into the fund. It is important to note that there is in most cases a two-year lag between the injury date and eligibility for transfer into the fund. This explains the tapering off of numbers in years 1991, 92 and 93. As time progresses and more of the 91, 92 and 93 injuries become eligible for transfer notification, these numbers will swell.

Table V arrays all of the files currently in the fund by year of injury. Thus, the active claims column provides some statistical insight into the life of a claim while in the SIF system. For example, the shaded area suggests, based on these data, that about 11 to 12 per cent of the active claimants will be in the system for 15 years, while another 5 to 7 per cent will remain more than 20 years.

Using the data from Table V, a conservative, estimate can be constructed to project an estimate of cumulative payout from 1994 through the turn of the century for a portion of the long-term benefit recipients. This estimate includes only indemnity payments to recipients expected to be on the system for 15 years.

If the trend data represent a reasonable multiplier for forecasting, 11 to 12 per cent, or about 2,741 of this year's active cases will be in the SIF system at least through the year 2000. For the purposes of this example, the committee summed those active cases in the pool with injuries dating from 1985 and projected payout for them through 2000. This provides a conservative estimate of the long term indemnity obligation for a slice of current claims. The costs can be roughly sketched from Table VI below which shows average claims.

**Table VI. Average Payments**

| DISBURSEMENTS | FY 93/94* | FY 92/93 | FY 91/92 |
|---|---|---|---|
| AV. Claims | $18,000** | $17,445 | $16,891 |
| Av. Medical | $345 | $335 | $330 |
| Av. Lump Sum | $28,997 | $24,004 | $23,171 |

* 1st six months of FY 93/94
** Annualized estimate

Source: Second Injury Fund

The fund provides annual cost of living adjustments (COLA's) for long term indemnity payments. Assuming an annual 4.5% COLA compounded on the 1994 average claim payment for 6 years (1994 - 2000), an individual member of this group will be receiving $23,440 in 2000. More than $64 million will be paid out that year for those 2,741 claimants who are in the system today. Collectively, that group will receive more than $331 million over the next six years.

This example represents a moderate portion of the total annual payout by the fund. It does not include stipulated settlements, medical payments, reimbursements to insurers and employers, and administration. These four categories, shown in Table VII, accounted for 64 per cent of the FY 92/93 disbursements, suggesting the payout by the fund over the next six years would exceed $1 billion. This estimate also assumes the growth rate in active cases over the last six years. It makes no allowances for the substantial backlog of 21,000 cases which need to be brought into the system.

**Table VII. Categorical Disbursement Growth (000)**

| DISBURSEMENT CATEGORIES | FY 93/94 BUDGET | 7/1 - 12/31 FY 93/94 | FY 92/93 | FY 91/92 |
|---|---|---|---|---|
| Stipulations | $21,170* | $11,0767 | $13,658 | $8,805 |
| Reimbursements | $49,248 | $15,736 | $30,214 | $18,584 |
| Medical | $14,993 | $4,402 | $11,489 | $8,852 |
| Loss Wages | $41,943 | $18,829 | $34,664 | $28,714 |
| Administration | $6,001 | $2,869 | $5,000 | $4,700 |
| TOTAL | $133,296 | $52,914 | $95,025 | $69,655 |

*$15,000,000 in Feb. 1994 budget revision
Source: Second Injury Fund

The growth displayed by category in Table VII between FY 91/92 and FY 92/93 is dramatic in each area. However, the greatest increase occurred with stipulations (lump sum payments), which is a controllable outlay. This category grew 55 per cent over the year, and $11 million was disbursed during the first six months of FY 93/94. Indeed, stipulation disbursements grew by 26 per cent for the first six months of this fiscal year over the entire 91/92 fiscal year.

The growth in lump sum settlements may not necessarily be a poor strategy. These settlements could reduce long term obligations of the fund. However, the decision to settle with a lump sum rather than long term payout should be the result of a carefully crafted strategy and policy. Currently no such policy nor strategy exists to guide these decisions. However, the fund has said it will hire a consultant to assist it in drafting a lump sum settlement policy, and has frozen stipulated settlements for FY 93/94 at $15 million, as noted above.

Table VIII outlines a distribution of the stipulated settlements for the first six months of FY 93/94, showing almost 80 per cent of the awards are for less than $50,000 and account for 38 per cent of the stipulation expenditures. As one would expect, the number and per cent of claims declines as the price of settlement increases. Claimants with long term injuries and disabilities are unlikely to settle for a one-time payment and forego long term financial security and medical care.

The final cost area for discussion is administration. This includes outlays to administer the Second Injury Fund and some staff in the Office of Attorney General. The legal staff represents the fund in contested transfer cases. Not all transfer requests by insurers and employers have merit, and these are argued before and adjudicated by a workers' compensation commissioner. Cases may also be appealed through the courts.

**Table VIII. Stipulated Settlements By $ Outlay Range****

| | < $50K | $50 to $100K | $100 to $150K | $150 to $200K | > $250K | TOTAL |
|---|---|---|---|---|---|---|
| TOTAL $ OUTLAYS | $4,208K | $3,883k | $2,045K | $714K | $225K | $11,076K |
| CLAIMS | 300 | 58 | 19 | 4 | 1 | 382 |
| AVERAGE CLAIM | $14K | $67K | $108K | $179K | $225K | $29K |
| % OF TOTAL $ | 38% | 35% | 18% | 6% | 2% | 100%* |
| % OF CLAIMS | 79% | 15% | 5% | 1% | <1% | 100%* |

*Sums do not total 100% due to rounding
**July 1 - Dec. 31, FY 93/94
Source: Second Injury Fund

Administrative costs for fund operations, adjudication, and litigation are consistently around 5 per cent of total disbursements. As fund disbursements have grown, so have administrative costs, but have remained at about 5 per cent. The fund budgeted $6 million for administration during FY 93/94, up from $5 million for the previous fiscal year. There are additional costs borne by the Workers' Compensation Commission for its role in adjudicating cases. However, these administrative costs are not broken out by the commission for its SIF activities.

## Assessments

As discussed in Chapter I, the Second Injury Fund is supported by periodic assessments of employers through their insurance carriers or directly for self-insured employers. The assessments are a percentage of the workers' compensation loss payout for the previous full year. The fund is limited to a 5 per cent maximum assessment, but there are no limitations on the number assessments it can issue during the year.

In FY's 91/92 and 92/93 the fund issued three assessments each year, which were preceded by two assessments for each of the two previous fiscal years. Only one assessment had been levied during the first

half of the current fiscal year, but it is expected at least one, and probably two more will be issued before the end of this year. With disbursements this year expected to exceed $125 million, it seems very unlikely FY 93/94 could be closed with only two. Indeed, with each assessment generating between $31 and $33 million, it would seem that only three assessments would fall significantly short of covering projected outlays without slowing down the disbursement process.

## Case Management

Employers and insurers have argued they are best equipped to manage cases, rather than a disinterested governmental entity (self-insured employers contract case management with an insurance claims adjustment entity). Insurers say claims management is their business and they have developed sophisticated systems and organizations to accomplish it.

In addition to experience, the argument turns on the issue of economic self interest. Insurers believe they would be the most effective entity to manage second injury claims, and want to because it directly affects their profitability. The committee discussed the claims management question with numerous representatives of the insurance industry as to what constitutes an effective claims management system and how do insurers verify it is cost beneficial.

On the surface the argument is compelling. Profitability turns on minimizing costs. Effective claims management controls excessive payments for losses by monitoring medical costs, procedures, and rehabilitative progress. The insurance industry has the most experience, organization, and trained personnel in this area.

However, industry representatives were unable to point to or show definitive, quantitative, cost benefit analyses they or others might have conducted. There is probably no question that insurance companies' case management systems do produce savings for them. The fact they have never tested the notion, however, is puzzling. It would appear to make sound business sense, if for no other reason than budgeting and planning. The committee agrees the companies' case management systems most likely save money. The amount of savings or ratio of savings to case management costs, however is problematic.

## Other States

Chapter I discusses the program review committee survey conducted of other states' second injury fund operations. Data from that survey are reconfigured and further shown in Tables IX and X below. For analytical purposes here, the committee truncated the data to the top 10 states for two different comparisons -- expenditures as a per cent of workers' compensation claim disbursements, and the ratio of SIF dollars disbursed per worker in the labor force.

| Table IX. National Data By State | | | |
|---|---|---|---|
| **SIF/WORKERS COMPENSATION DISBURSEMENT TOP 10 RANKINGS** | | | |
| STATE CY/FY 1993 | CURRENT CLAIMS | SIF DISBURSE-MENTS | SIF/WORKERS COMP RATIOS |
| Kentucky | 16,042 | $112,200,000 | 33.7% |
| South Carolina | 1,904 | $46,747,300 | 20.4% |
| Connecticut | 3,813 | $90,024,800 | 19.2% |
| New York | 28,060 | $108,815,300 | 11.2% |
| Oklahoma | 2,716 | $18,113,191 | 8.0% |
| Minnesota | 4,853 | $32,467,000 | 7.1% |
| Florida | 4,470 | 76,923,000 | 6.9% |
| Delaware | 400 | $4,330,200 | 6.8% |
| Michigan | 4,151 | 40,863,000 | 5.9% |
| Georgia | 2,956 | $33,638,000 | 5.2% |
| Source: LPR&IC Survey | | | |

Connecticut ranks among the top three states in all comparative analyses conducted by staff. It ranks third in total SIF expenditures and third in its disbursement per claim ratio. Other top ranking states are Kentucky, New York, and South Carolina. Kentucky is the runaway leader in most analyses due to the prevalence of black lung disease resulting from its mining industry. New York ranks high because of the sheer number of claimants paid -- 28,060. New York has a relatively low benefit rate, since its cost per claim is one sixth of Connecticut's. Similarly, Kentucky has four times as many claimants as Connecticut, but about one third the benefit rate.

If Connecticut carried the same number of clients in its fund as Kentucky does (and conceivably it could if the backlog of pending cases were cleared out), its annual disbursements for last year would have exceeded $350 million.

Table IX above is particularly telling for an industrial state. Essentially, it says that for every $100 disbursed for workers' compensation benefits, another $20 are paid SIF claimants. Moreover, this is a rising ratio that is expected to continue its rapid rate of growth. The effect is to shift the cost burden from the worker's compensation system to the fund. And in a perverse fashion, if rising, experience-rated workers' compensation premiums are an incentive for an uncaring employer to correct an unsafe work place, the SIF system redistributes those punitive costs to an employer concerned with worker safety.

| Table X. National Data By State | | | |
|---|---|---|---|
| **LABOR FORCE/DISBURSEMENT RANKINGS - TOP 10** | | | |
| STATE CY/FY 1993 | CURRENT CLAIMS | SIF DISBURSEMENTS | LABOR FORCE RATIOS |
| Kentucky | 16,042 | $112,200,000 | $64.33 |
| Connecticut | 3,813 | $90,000,000 | $53.06 |
| South Carolina | 1,904 | $46,747,300 | $26.38 |
| Minnesota | 4,853 | $32,467,000 | $13.36 |
| New York | 28,060 | $108,815,300 | $12.77 |
| Oklahoma | 2,716 | $18,113,191 | $11.86 |
| Florida | 4,470 | $76,923,000 | $11.74 |
| Delaware | 400 | $4,330,200 | $11.64 |
| Georgia | 2,956 | $33,638,000 | $10.41 |
| Michigan | 4,151 | $40,863,000 | $8.56 |
| Source: LPR&IC Survey | | | |

As the second injury fund continues to grow and a greater proportion of workers' compensation beneficiaries are shifted to the Second Injury Fund, that inequity will be magnified. And as the financial burden shifts from worker's compensation to SIF, the equity distortions caused by the SIF assessment process will be greater.

Table X above arrays the data and ranks states according to SIF disbursements per labor force unit (worker). Connecticut is second after Kentucky, ahead of all industrial states. What this table states is that $53 were disbursed by the fund in FY 92/93 for each worker in the labor force. Aside from Kentucky, no other state is even close and Kentucky is not far ahead. Connecticut's expenditure per worker last year was greater than the aggregate of the next three following states.

## CHAPTER III

## FINDINGS

**Programmatic Disincentives.** The Second Injury Fund, as a program and system, is without meaningful limits to its growth, which translates into cost. In fact, the Second Injury Fund by its nature serves as an economic safety valve to the insurance industry and self-insured employers for worker's compensation costs. As such, there is a strong economic incentive for worker's compensation insurance carriers and self-insured employers to use the fund to the maximum by transferring every eligible claimant to it. Further, there are no formal nor economic incentives to control administrative costs, manage cases effectively and efficiently by fund managers or insurers, or limit overall costs to employers.

**Policy and Programmatic Controls.** There are no statutory or regulatory controls governing growth of the fund in general or entry into it in particular. Other states limit entry to certain injury or disability categories or exclude others. Some do not pay medical benefits, and others have time or payout limits. Connecticut's entry restrictions are minimal.

**System Distortions.** SIF use and finance patterns work heavily against the employer with little workers' compensation exposure. Beneficiaries of the program are insurance carriers and self-insured employers who aggressively use the system. Cost of the system is disproportionately redistributed to insured employers with good workers' compensation records.

**Program Growth.** The client load and expenditure of the fund has experienced extraordinary growth over the last decade, and is expected to grow at an even greater rate in the decade to come. Without significant reform, the fund could serve tens of thousands of clients by the end of the century with expenditures and obligations in the billions of dollars. The program currently serves about 4,000 claimants at a budgeted cost exceeding $120 million this year, and has approximately 21,000 additional backlogged cases seeking entry.

**Other States.** Connecticut is among the top three states in the country for total expenditures, expenditures per client, expenditures per unit of work force, and expenditures as a ratio of workers compensation benefits paid. It is also a leader in program growth over the last decade. Other states with far less costly and ambitious programs have moved to discontinue or scale back their second injury funds.

**Unfunded Liability.** Connecticut's liability is unfunded and undocumented as to its financial exposure. The full liability of the Second Injury Fund is currently unknown, but suspected to reach into the billions of dollars. A consulting actuary has been hired by the treasurer to assess the state's exposure.

**Continuing Purpose of the Fund.** The Second Injury Fund was initially created to encourage employers to rehire workers previously injured on the job. The policy has been expanded to include any worker with a handicap, regardless of whether incurred on the job or not. State laws governing

discrimination against handicapped individuals and the federal Americans with Disabilities Act (ADA) have obviated the original policy purpose for the program.

Given the existence in Connecticut of an effective worker's compensation system, coupled with state and federal law protecting the employment rights of the disabled, there is no compelling policy reason for continuing the true second injury functions of the Second Injury Fund. Generally, these are indemnity, medical, and stipulated settlement payments made under C.G.S 31-349. They duplicate existing systems within government and the private sector. Further, they add elements of uncontrolled cost and growth, inequitable responsibility for paying the costs, administrative complexity, and blurred accountability to an already costly and complex worker's compensation system that is just beginning to feel the results of reform. True second injury (31-349) activities account for 72 per cent of the fund's expenditures.

# APPENDICES

APPENDIX A

# Connecticut General Assembly

JOINT COMMITTEE ON LEGISLATIVE MANAGEMENT
OFFICE OF LEGISLATIVE RESEARCH
(203) 240-8400

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LEGISLATIVE OFFICE BUILDING
Room 5300
HARTFORD, CONNECTICUT 06106

August 6, 1990 90-R-0637

TO: Honorable Naomi Cohen

FROM: Office of Legislative Research
Judith S. Lohman, Principal Analyst

RE: Employment Discrimination Provisions of the Americans with Disabilities Act of 1990

You asked us to summarize the employment provisions (Title I) of the new federal Americans with Disabilities Act (ADA).

**SUMMARY**

The Americans with Disabilities Act of 1990 was passed by Congress on July 12, 1990 and signed into law by President Bush on July 27, 1990. The ADA prohibits discrimination against people with disabilities in employment (Title I), public services (Title II), public accommodations and services operated by private entities (Title III), and telecommunications relay services (Title IV). This report summarizes the employment provisions of the new law.

In general, the ADA prohibits employers, employment agencies, labor organizations, and joint labor-management committees from discriminating against qualified individuals with physical or mental disabilities in (1) job application procedures; (2) hiring; (3) promotion; (4) discharge; (5) compensation; (6) job training; or (7) other terms, conditions, and privileges of employment. The act incorporates most of the enforcement policies and procedures that already exist under Title VII of the 1964 Civil Rights Act. The act's employment provisions go into effect in two years (July 12, 1992).

Although under Connecticut state law, employment discrimination against people with present or past histories of mental disorder, mental retardation, or physical disability is already illegal (CGS Sec. 46a-60 (1), (2), and (3)), the new federal act goes much further. It requires employers to make "reasonable accommodations" in job duties and in the workplace for people with disabilities and restricts employers' authority to make medical inquiries and require medical examinations of job applicants and employees. In addition, the ADA is broader than Connecticut law because it covers not only those with current or past disabilities but also those who are perceived to be disabled and those who are related to, or associated with, people with known disabilities.

**COVERAGE**

Employers

For the first two years (July 12, 1992 to July 12, 1994), the act covers employers engaged in industries affecting commerce, or their agents, who regularly employ at least 25 people. After July 12, 1994, the act will cover employers of 15 or more, making the ADA's coverage the same as that of the 1964 Civil Rights Act. The ADA does not apply to the U.S. government or any of its wholly owned corporations, Indian tribes, or bona fide tax-exempt private membership clubs other than labor organizations.

Definition of Disability

The ADA prohibits job discrimination against any "qualified individual with a disability," who it defines as someone who can, with or without reasonable accommodation, perform the essential functions of a particular job. It requires the following to be considered in determining what job functions are essential: the employer's judgement and any written job description prepared before the employer advertised for or interviewed applicants.

The act defines a disability as:

1. any physical or mental impairment that substantially limits at least one major life activity,

2. having a history of such an impairment, or

3. being regarded as having such an impairment.

The act explicitly excludes the following conditions from its provisions:

1. homosexuality;

2. bisexuality;

3. transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not the result of physical impairments, and other sexual behavior disorders;

4. compulsive gambling, kleptomania, and pyromania; and

5. mental disorders caused by current illegal drug use.

**PROHIBITED EMPLOYMENT PRACTICES**

The following employment practices constitute discrimination under the ADA and are expressly prohibited:

1. limiting, segregating, or classifying a job applicant or employee because of his disability so as to affect adversely his status or opportunities;

2. participating in a contract or other arrangement that has a discriminatory effect (covers agreements between employers and employment agencies, labor unions, and organizations that provide fringe benefits or training and apprenticeship programs);

3. using standards, criteria, or administrative methods that have a discriminatory effect or perpetuate discrimination by others subject to common administrative control;

4. excluding or denying equal jobs or benefits to a qualified person because he is associated with, or related to, a person with a known disability;

5. failing to make reasonable accommodations for an otherwise qualified person with a disability;

6. denying employment opportunity because reasonable accommodation is needed;

7. using qualification standards, employment tests, or other selection criteria that exclude or tend to exclude people with disabilities either individually or as a class, unless the employer can show that the criteria or tests are related to the position in question and consistent with business necessity; and

8. failing to select and administer employment tests so as to ensure that an applicant's sensory, mobility, or speaking impairment does not produce an inaccurate picture of his skills, aptitude, or other factors being measured (unless it is sensory, mobility, or speaking skills themselves that are being tested).

## REASONABLE ACCOMMODATION

The act requires employers to make certain types of changes in jobs and worksites to allow people with disabilities to work and makes it discrimination not to do so. It uses the generic term "reasonable accommodation" for these required job and worksite changes but does not specifically define it. Instead, the act gives examples of the kinds of things "reasonable accommodation" may include. They are: (1) making existing facilities that employees use readily accessible to and useable by those with disabilities; (2) restructuring one or more jobs; (3) instituting modified or part-time work schedules; (4) reassigning to vacant positions; (5) acquiring or modifying equipment; (6) making appropriate adjustments in employment examinations, training materials, and policies; and (7) providing qualified readers and interpreters.

The act does not require a person with a disability to accept an accommodation if he chooses not to.

## EXCEPTIONS, MITIGATIONS, AND DEFENSES

### Undue Hardship

The act does not force employers to make accommodations that would impose an undue hardship on their business operations. It defines an undue hardship as any accommodation requiring significant expense. It delegates to the enforcement agency the authority to make determinations about what is or is not an undue hardship in particular cases, but it sets out the following factors to be considered in making those decisions:

1. the accommodation's nature and cost;

2. the particular business facility's financial resources, number of employees, and the effect on its expenses, resources, and operations;

3. the employer's overall financial resources, business size, number of employees, and the number, type, and location of its facilities; and

4. the type of business and how it operates, including the composition, structure, and functions of its workforce, and the geographic separateness of, and administrative and fiscal relationship between, the facility and employer.

Health and Safety

It is not illegal under the ADA to require that an individual with a disability not pose a direct threat to the health and safety of his fellow workers. The act defines a "direct threat" as a significant risk that cannot be eliminated by a reasonable accommodation.

Business Necessity

The act makes it possible for an employer to defend against a charge of discrimination by showing that qualifications, tests, or selection criteria that serve to screen out people with disabilities are job-related and consistent with business necessity, and that the same level of performance cannot be achieved using reasonable accommodations.

SPECIAL CIRCUMSTANCES AND SITUATIONS

Medical Examinations and Inquiries

Job Applicants. The act prohibits employers from requiring medical examinations of job applicants, except under limited conditions, and prohibits prospective employers from asking applicants about the nature or seriousness of any obvious or known disability. A prospective employer may ask preemployment questions about an applicant's ability to carry out a particular job-related function.

Employers are allowed to require medical exams after they offer the applicant a job. But they may make employment conditional on the exam results only if (1) all entering employees, regardless of disability, have to have exams; (2) medical information collected is kept in a separate, confidential file; and (3) the employer does not use the exam results to violate the act.

The act makes three exceptions to its confidentiality requirement for medical records.

1. Supervisors and managers may be told about necessary restrictions and accommodations in duties and work.

2. First aid and safety personnel may be told, if appropriate, if a disability might require emergency treatment.

3. Government officials investigating compliance with the act must be given relevant information on request.

**Current Employees.** Employers may not require medical examinations for employees or make inquiries concerning disabilities unless:

1. they can show the exam or inquiry is job-related and a business necessity; or

2. the exam is voluntary and part of an employee health program available to all employees at the same work site.

Employers may also inquire into an employee's ability to perform job-related functions.

**Use of Drugs and Alcohol**

The ADA does not protect employees or job applicants currently engaged in illegal drug use as long as the employer is acting on the basis of that use. But the act does cover anyone who is currently participating in, or has successfully completed, a supervised drug rehabilitation program; is otherwise successfully rehabilitated and no longer using drugs; or is mistakenly regarded as an illegal drug user.

It does not violate the act for an employer to use reasonable policies and procedures, including drug testing, to ensure that rehabilitated drug users remain drug-free. The act does not prohibit employee drug testing nor does it affect drug use standards and procedures required under Department of Transportation, Department of Defense, or Nuclear Regulatory Commission regulations.

The ADA explicitly allows employers to:

1. prohibit use of illegal drugs or alcohol use at work,

2. require that employees not be under the influence of alcohol or illegal drugs at work,

3. carry out policies and requirements specified in the federal Drug Free Workplace Act of 1988, and

4. hold an employee who uses illegal drugs or is an alcoholic to the same job performance standards as other employees even if unsatisfactory performance is related to drug use or alcoholism.

Infectious and Communicable Diseases

The act requires the Health and Human Services secretary, in the next six months, to review and publish a list of all diseases that may be transmitted through food handling. The secretary must disseminate the list widely and update it every year. Employers may refuse to assign those with a listed disease to food handling jobs if there is no other reasonable accommodation.

Insurance

As long as a benefit plan is not used the evade its purposes, the act does not prohibit insurers, hospitals or medical service companies, health maintenance organizations, or other entities that administer benefit plans from classifying, underwriting, or administering risks consistent with state laws. Neither does it prohibit employers, labor organizations, or others from establishing, sponsoring, or organizing benefit plans based on such risks whether or not a plan is subject to state insurance laws.

Religious Entities

The act does not prohibit religious corporations, associations, schools, and societies from giving employment preference to people of a particular religion in carrying out its activities. It allows a religious organization to require that its applicants and employees conform to its religious tenets.

ENFORCEMENT AND REMEDIES

The act incorporates by reference the enforcement powers, procedures, and remedies of Title VII of the 1964 Civil Rights Act (42 USC 2000e-4 to 2000e-9). Thus, Title VII procedures will be used to enforce the ADA. Both Title VII and the ADA are administered by the federal Equal Employment Opportunity Commission (EEOC).

Under Title VII and the ADA, a complaint alleging employment discrimination must be filed with EEOC within 180 days after it occurs unless there is a similar state or local antidiscrimination law with its own procedure for investigating and resolving complaints. In such cases, the procedure is modified to encourage resolution of complaints at the local level. If the complaint is originally filed with a state or local agency, an EEOC complaint may be filed

up to 300 days after the alleged discrimination or 30 days after notice of termination of local proceedings, whichever comes first. If a complaint is filed with EEOC first, the commission must defer to local proceedings for 60 days before undertaking its own investigation.

After a complaint is filed, the EEOC must serve notice of the charge on the employer within 10 days. EEOC then investigates and determines if there is reasonable cause to believe discrimination occurred. If cause is found, EEOC attempts conciliation. If that fails, the commission by sue in federal district court. If no cause is found, or if within 180 days there has been no conciliation or suit filed by EEOC, the commission grants the complainant a "right to sue" letter. The complainant then has 90 days to sue in federal district court.

All district court proceedings are de novo, that is, held without regard to earlier proceedings. If the court finds illegal employment discrimination, it may enjoin the practice and grant the plaintiff relief. Relief may include reinstatement, retroactive seniority, and up to two years' back pay. The court may also award attorneys' fees to prevailing parties.

Under the ADA, states are not immune from suit for violating the act and the same remedies are available for a state violation as for a violation by a private employer.

RETALIATION, INTERFERENCE, COERCION, AND INTIMIDATION

The ADA prohibits discrimination against anyone because he has opposed conduct the act makes illegal or made a charge, testified, helped, or participated in an investigation or proceeding under it. It is also illegal to intimidate, coerce, threaten, or interfere with anyone's exercise of rights granted by the act or anyone's encouragement of others to exercise those rights.

JSL:pa

## APPENDIX B

## AGENCY RESPONSE

The Office of the State Treasurer had no comment on the final report.